

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. H-07/08-305
)
 Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Family Services Division substantiating a report of sexual abuse by the petitioner of a child. The preliminary issue is whether the petitioner's appeal is timely.

DISCUSSION

The petitioner is fifteen years old. He is now represented by an attorney in the Office of the Defender General. Previously, at all times pertinent to this fair hearing, he was represented by a private attorney who had been assigned to him pursuant to a related matter in juvenile court. There is no dispute in this matter that by a notice addressed to this attorney dated January 16, 2008 the Department informed the petitioner that an allegation of sexual abuse by the petitioner of another child, a female identified as T.S., had been substantiated, and that the petitioner had until January 31, 2008 to request a "review"

of that substantiation. A pamphlet further explaining the registry and appeal rights was enclosed with the notice.

The petitioner timely filed his request, and an administrative review hearing was held, which was attended by the petitioner's attorney and his guardian ad litem. The parties agree that on February 28, 2008 the Department issued a review decision substantiating the report as one of child sexual abuse. The parties further agree that due to an administrative error the Department did not mail its review decision until April 18, 2008.

The review decision was addressed to the petitioner "c/o" his attorney at his attorney's office address. The petitioner does not dispute that his attorney duly received the decision shortly after it was mailed.

The Department's review decision detailed the factual allegations against the petitioner and included a legal discussion, including statutory citations, of the Department's decision that the allegations constituted sexual abuse. The petitioner makes no argument that the decision did not sufficiently notify him of the factual and legal bases of the Department's decision to substantiate the report as one of sexual abuse.

The preliminary issue in this matter concerns the wording in the review decision regarding the petitioner's right to appeal. In bold letters, the reviewer's decision included the following notice:

After review of all available information I find that legal and policy standards have been met and that it is appropriate that your name be placed in the Child Abuse and Neglect Registry. If you disagree with this decision, and you wish to further appeal, you should advise the Human Services Board, by writing to it within 30 days this letter was date stamped by the Post Office.

As noted above, the parties agree that the date of mailing of this notice was April 18, 2008. The petitioner concedes that he did not file an appeal with the Human Services Board until July 7, 2008, eighty days after the mailing date of the review decision.

The petitioner argues that the above notice, which his attorney received on or about April 18, 2008, was insufficient as a matter of due process to adequately inform him of the appeal deadline. More particularly, the petitioner maintains the use of the word "should" in the notice indicated that the 30-day appeal period was only a "guideline". Therefore, he argues that the notice was defective, and that his July 7, 2008 appeal to the Board should be considered timely.

Virtually all the cases cited by the petitioner regarding defective notices concern the lack of content in those notices regarding the facts and law pertaining to the agency's actual *decision*, not the lack of notice regarding the affected party's appeal rights regarding that decision. The sum and substance of those rulings (which the Board has often applied in similar cases) is that unless a notice adequately conveys the factual and legal bases of the agency's decision, it does not meet due process and is invalid, thus requiring the summary reversal of any adverse action by the agency against that individual based on that notice (i.e., no valid notice--no implementation of any adverse decision stemming from that notice).

However, this is not the case herein. There is no question that the notice the Department sent the petitioner in this matter was clear and thorough in communicating the factual and legal bases of the Department's decision substantiating sexual abuse. Also, it cannot be said that it was *inaccurate* in specifying a 30-day time limit for appeal. At worst, it was not as unequivocal as it could have been in emphasizing that the 30-day appeal deadline was absolute. However, it cannot be concluded that the Department's inadvertent use of the word "should", standing alone, is

sufficient to require what-would-amount-to a waiver of the statutory appeal limit as a matter of equity or due process.

The *jurisdiction* of the Human Services Board to consider appeals regarding the Department's substantiation of reports of child abuse and neglect is statutory. 33 V.S.A. § 4916b(a), which became effective September 1, 2007, provides, in pertinent part:

(a) Within 30 days of the date on which the administrative reviewer mailed notice of placement of a report on the registry, the person who is the subject of the substantiation may apply in writing to the human services board for relief. The board shall hold a fair hearing pursuant to 3 V.S.A. § 3091. When the department receives notice of the appeal, it shall make note in the registry record that the substantiation has been appealed to the board.

. . .

(d) If no review by the board is requested, the department's decision in the case shall be final, and the person shall have no further right for review under this section. The board may grant a waiver and permit such a review upon good cause shown.

The petitioner in this case is essentially arguing that the Board, as "good cause", should consider this appeal out of time as a matter of *equitable estoppel* against the Department due to the wording of its appeal notice. The elements of equitable estoppel have been clearly set out by the Board in several past cases, one of which was affirmed by the Vermont Supreme Court, namely:

- (1) the party to be estopped must know the facts;
- (2) the party to be estopped must intend that its conduct shall be acted upon or the acts must be such that the party asserting the estoppel must be ignorant of the true facts;
- (3) the party asserting estoppel must be ignorant of the true facts; and
- (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped.

Stevens v. D.S.W., 159 Vt. 408, 421,
620 A.2d 737 (1992)
Citing Burlington Fire Fighters'
Ass'n v. City of Burlington. 149 Vt.
293, 299, 543 A.2d 686, 690-691
(1988)

Unfortunately for the petitioner, it cannot be concluded that the circumstances in this case meet any of the latter three elements set forth above. The biggest problem for the petitioner is that he was represented by an attorney, and that it was his attorney who actually received the notice in question. The petitioner certainly does not allege that simply by inadvertently using the word "should" the Department *intended* his attorney not to file an appeal within the statutory time frame. But even if that was the case, no attorney can reasonably maintain that he or she can ever be "ignorant of the true facts" regarding an appeal deadline that is clearly set forth in a statute. The attorney in question was not new to the case. She had represented the

petitioner throughout the review process. She cannot now reasonably argue that she "relied" on some inadvertent wording in the notice to her client's detriment when the *primary* cause of the late filing of the appeal appears to have been her own lack of care and diligence.

Inasmuch as the elements of equitable estoppel are clearly not met, and no other good cause has been shown, it must be concluded that the Board does not have statutory jurisdiction to consider the petitioner's appeal, which was made well beyond the 30-day limit.

ORDER

The petitioner's appeal is dismissed as untimely.

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